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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 120

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Respondent.

BRIEF OF THE RESPONDENT, WEBSTER AND ATLAS NATIONAL BANK OF BOSTON

ROBERT H. DAVISON,
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HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE,

Respondent.

BRIEF OF THE RESPONDENT, WEBSTER AND ATLAS NATIONAL BANK OF BOSTON.

OPINIONS BELOW.

The opinions of the courts below have not yet been officially reported. They are set out on pages 12 to 19 inclusive and 185 to 196 inclusive, of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 16, 1940. The petition for certiorari was filed June 1, 1940. The jurisdiction of this Court is sought to be invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 12, 1925 (28 U.S.C.A., Sec. 347).

QUESTIONS PRESENTED.

1. Whether or not the trustees of the property of a railroad operating the property of lessor railroads under Section 77 (c) (6) of the Bankruptcy Act (11 U.S.C.A., Sec. 205 (c) (6)) for the account of the lessor roads after rejection of the leases are required by the Act of June 18, 1934, 38 Stat. 993 (28 U.S.C.A., Sec. 124a) or otherwise to pay the taxes levied against a terminal company, which taxes are the direct obligation of the lessors.

2. Whether or not the trustees of the property of a railroad operating the property of lessor railroads under Section 77 (c) (6) of the Bankruptcy Act for the account of the lessor roads are required by Section 65 of the Judicial Code (28 U.S.C.A., Sec. 124) or otherwise to pay the interest on the Terminal Company bonds, it being the express duty of the lessor railroads to pay their proportionate shares of such interest.

3. Whether or not the obligations imposed by Section 77 (c) (6) of the Bankruptcy Act require operation by the lessee after the lessor's account has been exhausted, and if so, whether such construction violates the Fifth Amendment to the Constitution of the United States.

STATUTES INVOLVED.

The statutes involved are the Act of June 18, 1934, 48 Stat. 993 (28 U.S.C.A., Sec. 124a), Section 65 of the Judicial Code (28 U.S.C.A., Sec. 124), Section 77 of the Bankruptcy Act (11 U.S.C.A. 205), and Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896.

STATEMENT.

In 1888 the Boston and Providence Railroad Corporation let its property to the Old Colony Railroad Company for a term of 99 years (R., pp. 129–143); and in 1893 the Old Colony let its property, including its leasehold interest in the Boston and Providence property, to The New York, New Haven and Hartford Railroad Company, also for a term of 99 years (R., pp. 72–80). At that time the City of Boston was served by the lines of the two lessors and by the New England Railroad Company and the Boston and Albany Railroad Company. After the lease of 1893, the properties of the two lessors were operated by the New Haven as parts of its railroad system.

In 1896 The Boston Terminal Company was incorporated by an Act of the Massachusetts legislature (Massachusetts Acts and Resolves, 1896, Ch. 516) to provide a union station for passengers on railroads entering the southerly part of the City of Boston. That Act requires (Sec. 9) all said railroad companies to use the terminal for all their terminal passenger business in Boston, said railroad companies being those companies referred to in Section 2 of the Act, namely, the Boston and Albany, the Boston and Providence, the Old Colony, the New England and The New York, New Haven and Hartford, being lessee of the Old Colony. Section 10 of the Act requires the five named railroads to pay to the Terminal Company for such use, the amounts necessary to cover the expenses of the Terminal Company including the interest upon its bonds. The Act of 1896 was amended in 1921 (Massachusetts Acts, 1921, Ch. 363) to include the New York Central. In the meantime, the New England had been merged into the New Haven (R., p. 16; Massachusetts Acts and Resolves, 1905, Ch. 252; Rhode Island Acts and Resolves, 1915, p. 452, Sec. 4). Thus the New Haven and the New York Central became the only

users of the terminal, all other companies enumerated in Section 2 of Chapter 516 having been leased or merged. The use of the terminal over the former New England line terminated prior to these proceedings (R., p. 16).

In 1931 the Department of Public Utilities of Massachusetts determined under Section 10 of the Act the proportion of use of the terminal at seventy per cent for the lines operated by the New Haven (including the Old Colony and Boston and Providence) and thirty per cent for the line operated by the New York Central (Boston and Albany) (R., p. 155). No reapportionment has been made since that time.

Upon approval, on October 23, 1935, of the petition of the New Haven for reorganization there came into the custody of the District Court, as a part of the system of lines operated by the New Haven, the lines of the Old Colony and the Boston and Providence. Continued operation of the system was provided for (R., pp. 44–52) and trustees were appointed (R., pp. 53–56). Both the Old Colony and the Boston and Providence leases have been rejected by the New Haven and Old Colony Trustees, respectively (R., pp. 66, 113), and the New Haven Trustees have continued to operate both lines for the account of the former lessors under orders so providing (*Palmer* v. *Palmer*, 2 Cir., 104 F. (2d) 161, cert. den. 60 S. Ct. 120; *Palmer* v. *Warren*, 2 Cir., 108 F. (2d) 164, affd. sub. nom. *Warren* v. *Palmer*, 60 S. Ct. 865 (1940); R., p. 69; p. 72; pp. 81–82; p. 87; p. 92; p. 112), pursuant to Section 77 (c) (6) (R., p. 186).*

The operations by the trustees of the New Haven of the Old Colony and Boston and Providence have been conducted at a large operating deficit each year. These deficits have

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* The District Court entered its order approving Old Colony's petition for reorganization in the New Haven proceedings on June 3, 1936 (R., pp. 81–83). The Boston and Providence has been in reorganization under Section 77 since August 5, 1938, in the District Court of the United States for the District of Massachusetts (R., pp. 126–128).

been met by the New Haven Trustees out of New Haven funds and now exceed $20,000,000. It has become apparent that the prior lien afforded the New Haven is not a sufficient security to warrant the diversion of additional funds without jeopardy to the New Haven's own creditors (R., p. 187). On their petition filed October 19, 1939, the District Court granted the New Haven trustees an order instructing them to withhold further payment of real estate taxes, franchise taxes, and bond interest of the Boston Terminal Company (R., p. 20). The Circuit Court of Appeals reversed the decision of the District Court because it found that Section 77 (c) (6) of the Bankruptcy Act was constitutional (R., p. 191); because it construed the provisions of Section 124a (28 U.S.C.A., Sec. 124a) to require the payment by the trustees of the New Haven of taxes legally assessed so long as operation under Section 77 (c) (6) continued (R., pp. 193, 194); and because it construed the provisions of Section 124 (28 U.S.C.A., Sec. 124) as requiring the trustees of the New Haven to comply with the provisions of the Massachusetts statute of 1896 (Mass. Stat. 1896, ch. 516) so long as operation under Section 77 (c) (6) continued (R., pp. 194–196). The Circuit Court of Appeals also found that the record presented no evidence that the costs of operation of the Terminal Company, including bond interest, were unreasonable (R., p. 196).

SUMMARY OF ARGUMENT.

Certiorari should not be granted in this case because:

1. The decision of the Circuit Court of Appeals with respect to the constitutionality of Section 77 (c) (6) of the Bankruptcy Act is correct and in accord with previous decisions of this Court, and with the decisions of other federal courts.

2. The decision of the Circuit Court of Appeals that the provisions of Chapter 516 of the Acts of the General Court

of Massachusetts for the year 1895 are a valid exercise of the police power of the Commonwealth is in accord with previous decisions of this Court and the decisions of other federal and state courts.

3. The construction by the Circuit Court of Appeals of the provisions of 28 U.S.C.A., Sec. 124a and the provisions of 28 U.S.C.A., Sec. 124 is correct and not in conflict with any applicable decision of this Court or with the decision of another circuit court of appeals on the same matter.

ARGUMENT.

I.

Section 77 (c) (6) of the Bankruptcy Act was passed by the Congress because public convenience often necessitates continued operation of a leased line even after rejection of the lease. An express duty is placed upon the lessor to operate such lines unless the judge of the District Court shall, after hearing, decree "that it would be impracticable and contrary to the public interest for the lessor to operate the said line" and in which case the duty of the lessee is to continue operation until abandonment is authorized by the Interstate Commerce Commission (49 U.S.C.A., Sec. 1). Even though the lease has been rejected, if considerations of practicability and the public interest lead to an order under the provisions of Section 77 (c) (6) directing continued operation of the formerly leased lines, the burden of operation, and consequently of meeting the expenses of operation, survives rejection.

The District Court as a part of its opinion argued that further operation under Section 77 (c) (6) should not be required after the lessor's account had become exhausted. As the Circuit Court of Appeals held, such a construction would not only violate the primary purpose of Section 77 (c) (6) to safeguard the interest of the public in continued

operation of the road, but would also usurp the power specifically delegated to the Interstate Commerce Commission of ultimate continuance or discontinuance of service. The responsibility of such abandonment of service has been placed by Congress with the Commission, and the New Haven trustees are in no way deprived of life, liberty or property without due process of law by the decision of the Circuit Court of Appeals, as these trustees have now and have had in the past the right to request the Commission to release the trustees from the duties and expenses of operation imposed by Section 77 (c) (6) through a petition to the Commission for abandonment of both the Old Colony and the Boston and Providence lines or either of them.

Colorado v. *United States*, 271 U.S. 153 (1926).
Palmer v. *Massachusetts*, 308 U.S. 79 (1939).

II.

Section 25 of Chapter 516 of the Acts of the General Court of Massachusetts for the year 1896 makes the using railroads named in Section 2 of the statute directly liable for real estate taxes (R., p. 154). Sections 9 and 10 of the statute require the said railroad companies to use the terminal company facilities for all of their terminal passenger business in Boston and to pay for such use, including taxes and interest upon the bonds of the Terminal Company (R., p. 8). There is nothing in the record to indicate that the charges are unreasonable (R., p. 196). There can be no doubt that this Massachusetts statute is a valid exercise of the police power of the state.

Mayor and Aldermen of Worcester v. *Norwich & Worcester R. R. Co.*, 109 Mass. 103 (1871).
Los Angeles Passenger Terminal Cases, 100 I.C.C. 421 (1925); 142 I.C.C. 49 (1928).

R. R. Comm. v. *Southern Pacific Co.*, 264 U.S. 331 (1923).

I. C. C. v. *Los Angeles*, 280 U.S. 52 (1929).

Atchison Ry. v. *Railroad Commission*, 283 U.S. 380 (1931).

III.

The Act of June 18, 1934, 48 Stat. 993 (28 U.S.C.A., Sec. 124a) declares that "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. * * *" In *Ingels* v. *Boteler*, 100 F. (2d) 915 (1938), *aff'd.* 308 U.S. 57 (1939) this section was applied generally in spite of an operating loss and the claim by the bankruptcy trustee that he was without funds. Section 124a has been held to apply to a trustee of a railroad under Section 77 of the Bankruptcy Act.

Thompson v. *Lousiana*, 98 F. (2d) 108, 111 (1938).

No decision of this Court or of any Circuit Court of Appeals has limited the general applicability of this section.

There is no basis for the contention that Section 124a is not applicable to trustees operating under the provisions of Section 77 (c) (6). The statute having placed upon the trustees of the New Haven the duty of operating the Old Colony and Boston and Providence roads, the trustees are thereby made the agents of the Court within the clear meaning of Section 124a. Since operation must continue until abandonment has been authorized, even though such operation is at a loss, taxes legally assessed must be paid by the trustees of the New Haven until operation ceases.

Although the respondent in opposition believes it a

matter of no consequence, there was no holding or finding by the Circuit Court of Appeals that "payment of the taxes would represent a cash loss to New Haven creditors that could not be re-collected", and the contrary assertion by the petitioners is an error (Petition, p. 9). The Circuit Court stated that "the prior lien afforded the New Haven is not a sufficient security to warrant the diversion of additional funds, without jeopardy to the claims of New Haven's own secured creditors". (R., p. 187.) Nor does it appear from the record, as claimed by the petitioners on page 9 of their petition, that ultimate payment of the taxes is assured through the lien accruing upon the property against which the tax is laid. On the contrary, in as much as Section 25 of the 1896 Massachusetts Act provides for the real estate to be assessed directly to the using railroads (R., p. 154), it may be seriously questioned whether any lien for such taxes against the real estate of the Terminal Company exists.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this Court nor any decision of any other Circuit Court of Appeals. The decision in the case of *Dulberg* v. *Zankel*, 67 F. (2d) 534, 537 was handed down before the enactment of Section 124a and is in no way relevant to the issues in this case.

In re Pittsburgh Railways Company, decided by the Circuit Court of Appeals for the Third Circuit on April 30, 1940 but not yet reported, is not in conflict with the decision in this case. The Pittsburgh Railways Company proceedings were under Section 77B of the Bankruptcy Act and therefore the situation of trustees operating leased lines under Section 77 (c) (6) was not before that court. The Federal statutes (28 U.S.C.A., Secs. 124 and 124a) were not mentioned.

Section 65 of the Judicial Code (28 U.S.C.A., Sec. 124) reads in part as follows: "Whenever in any cause pending

in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." A criminal penalty is also provided for violation of this section. It is undisputed that the trustees of the New Haven are in possession of and operating and managing the properties of the Old Colony and the Boston and Providence, and it would seem that the words "receiver or manager in possession of any property" are surely broad enough to cover the trustees of the New Haven in managing and operating these lines under the provisions of Section 77 (c) (6).

Converse v. *Massachusetts*, 101 F. (2d) 48, 51 (1939).

Palmer v. *Massachusetts*, 308 U.S. 79, 90, n. 17 (1939).

Section 124 clearly requires compliance with the provisions of Chapter 516 of the Massachusetts Acts of 1896. As has been pointed out above, this statute is undoubtedly a valid exercise of the police power of the state and similar statutes enacted under the police power have been consistently held applicable to railroad receivers.

Erb v. *Morasch*, 177 U.S. 584 (1900).

Pittsburgh & Shawmut Coal Co. v. *Delaware & N. R. Co.* 289 Fed. 133 (D.C. N.D. N.Y.) (1923).

Hornsby v. *Eddy*, 56 Fed. 461 (C.C.A. 8th) (1893).

Pierce v. *Van Dusen*, 78 Fed. 693 (C.C.A. 6th) (1897).

Converse v. *Massachusetts*, 101 F. (2d) 48 (C.C.A. 2d) (1939).

Burke v. *Morphy*, 109 F. (2d) 572 (C.C.A. 2d) (1940).

As stated by the Circuit Court, "such a statute may properly impose the costs of construction and operation upon the railroads concerned, as long as the expense is not so great as to be confiscatory, when considered in relation to the importance of the interests to be affected and to be served" (R., p. 195).

Atchison, Topeka & Santa Fe R. Co. v. *Railroad Commission,* 283 U.S. 380, 396 (1931).

Therefore so long as the Massachusetts statute is in force it must be obeyed, there being nothing in the record to indicate that the charges are unreasonable, much less confiscatory (R. p. 196).

The statement in the petitioner's brief on page 11 that admittedly operation into the terminal will continue whether or not the Terminal Company bond interest is paid is not correct. The bonds are now in default and if the interest is not paid it may well be that an application on the part of the bond trustee to take possession and to foreclose would be favorably entertained by the District Judge in Massachusetts. But even if the use of the terminal were to continue whether or not the bond interest and taxes are paid that can in no way relieve the trustees of the New Haven from the duties imposed upon them by the Federal statutes. Such an argument is nothing more than an effort to cloud the real issues. A similar observation may be made as to the argument of the petitioners on pages 11 and 12 of their petition that the decision below "requires petitioners to pay bond interest of the Terminal Company during the New Haven reorganization proceedings". Of course, it does no such thing. The New Haven trustees may at any time request the Interstate Commerce Commission for permission to abandon either or both the Old Colony and Boston and Providence lines. As the Circuit

Court of Appeals states, Congress has placed this responsibility upon the Commission (R., p. 191).

The decision of the Circuit Court of Appeals with respect to the applicability of Section 124 is not in conflict with any decisions of this Court nor any decision of a Circuit Court of Appeals.

CONCLUSION.

The respondent respectfully urges that the petition for certiorari be denied in view of the facts that:

1. Petitioner has not adduced any authority which casts doubt upon the correctness of the decision of the Circuit Court of Appeals.

2. No conflict of authority is shown to be involved nor is any novel question of law presented.

Respectfully submitted,

Robert H. Davison,

Attorney for the Respondent.

APPENDIX.

MASSACHUSETTS ACTS AND RESOLVES, 1896, Ch. 516:

"Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."